Supreme Court, U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent,
ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

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ARGUMENT

I

THE COURT HAS JURISDICTION UNDER 28 US.C. § 1257(3)

A. The Court of Appeal relied upon federal authorities and state cases which rely upon federal authorities

Real Parties in Interest, (hereinafter defendants) in their Opposition to the Petition for Writ of Certiorari, contend that jurisdiction does not lie under 28 U.S.C. section 1257(3) because the trial court's decision declaring California Penal Code section 190.2, subdivision (a)(14) to

be void for vagueness was explicitly based on the due process clause of both the State and Federal Constitutions. Although defendants are correct in stating the trial court's ruling was premised on both the State and Federal Constitutions, it is *not* the trial court's ruling which is subject to review in this Court. Rather it is the decision of the First Appellate District Court of Appeal of the State of California, Division Four, which is reviewable pursuant to 28 U.S.C. section 1257(3).

The State Court of Appeal, in its decision clearly relied upon the due process clause of the Federal Constitution to strike down the especially heinous, atrocious, or cruel "special circumstance" of California Penal Code section 190.2(a)(14). The Court of Appeal set out the guiding principles of due process as follows:

> "A penal statute violates due process requirements if it is so vague that a person of common intelligence must speculate as to its meaning. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) When a statute is attacked for vagueness and uncertainty under the due process clause, there are two facets to the examination. 'A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed [notice] as well as a standard for the ascertainment of guilt by the courts called upon to apply it [guidance].' (*People v. McCaughan* (1957) 49 Cal.2d 409, 414.) The language of section 190.2, subdivision (a)(14), does not provide adequate guidance to juries." (Petition for Writ of Certiorari, A-3.)

Although the Court of Appeal cited *People v. McCaughan,* 49 Cal.2d 409 (1957) in addition to the landmark *Lanzetta* decision of this Court, the authorities on which *McCaughan* relied utilized the federal rule. The principal citation in *McCaughan* is *Winters v. New York,* 333

U.S. 507, 515-516 (1948). The *Winters* case is followed by California cases; however, these cases also follow the federal due process standard for avoidance of vagueness in criminal prosecution. See *In re Peppers*, 189 Cal. 682, 686 (1922); *People v. Building Maintenance Contractors' Assn., et al.*, 41 Cal.2d 719, 725 (1953); *People v. Saad*, 105 Cal. App.Supp.2d 851, 854 (1951). Since the Court of Appeal in the instant case relied solely on the standards of due process expressed in federal cases and California cases which solely rely on federal cases, without citing or otherwise referring to the California Constitution, the Court of Appeal decision is grounded solely on the federal due process clause. Moreover, the fact that the Court of Appeal found it necessary to attempt to distinguish *Proffitt v. Florida*, 428 U.S. 242 (1976), reveals the federal basis. Cf. *Oregon v. Hass*, 420 U.S. 714, 719-720 (1975).

B. Article I, section 27 of the California Constitution establishes that the validity of the challenged special circumstance may be decided only by reference to the Federal Constitution

In the Opposition defendants contend that Article I, section 27 of the California Constitution (quoted in the Petition for Writ of Certiorari at p. 10) does not limit review of the California death penalty law only to the Federal Constitution. (Opposition, at p. 2.) In answer we direct the Court to the "Detailed Analysis by the Legislative Counsel" submitted to the voters in the November 7, 1972 General Election.

> "Adoption of [Article I section 27] would specifically prevent the provisions in Section 6 of Article I, or any other provision, of the California Constitution from being held to prohibit the death penalty. [¶] If this measure is adopted, every statutory law of California relating to the death penalty that was rendered in-

> effective by the decision of the California Supreme Court would be reinstated (subject to amendment or repeal) insofar as their validity under the California Constitution is concerned. Their validity under the United States Constitution, however, is a separate issue. [¶] The United States Supreme Court has held that the United States Constitution bars imposition of the death penalty in certain criminal cases under statutes giving uncontrolled discretion to judges or juries to determine whether or not to impose the death penalty. The United States Supreme Court, however, did not hold that the United States Constitution precludes the imposition of the death penalty in all cases. *This measure would, therefore, make effective the statutes of this state relating to the death penalty to the extent permitted under the United States Constitution.*" (Ballot Pamp., Proposed Amends. to Cal.Const. with arguments to voters, Gen.Elec. (Nov. 7, 1972), emphasis added.)

The California Supreme Court has held that ballot arguments and analysis presented to voters may be helpful in determining the probable meaning of constitutional amendments adopted by the initiative process. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245-246 (1978). As we pointed out in the Petition for Writ of Certiorari, the California Supreme Court in *People v. Frierson*, 25 Cal.3d 142 (1979) recognized that the purpose of Article I, section 27 was to conform "California Law to the demands of the federal Constitution, as expressed by the high court in *Furman* and *Gregg v. Georgia, et al.*" *Id.*, at 185. *Furman* and *Gregg v. Georgia, et al.* reach not only the constitutionality of the death penalty as a punishment, but, equally important, establish the minimum federal constitutional

due process requirements for determining whether the death penalty is appropriate in a particular case.

Although, as defendants point out (Opposition, at p. 2), the portion of the *Frierson* opinion cited in the petition was a plurality opinion, still the view of the majority of the justices was that the validity of the California death penalty procedures was ultimately a federal question. Justice Mosk, in a separate opinion, concurring in the judgment expressed in the lead opinion written by Justice Richardson and joined by Justices Clark and Manuel, indicated his view that Article I, section 27 insulated the California Death Penalty statutes from review under the state constitution. Justice Mosk said:

> "I am therefore compelled to conclude that the 1977 death penalty legislation does not violate the California Constitution. Whether it complies with the federal Constitution is a different question that is much more difficult to answer. The difficulty, of course, is that the United States Supreme Court has both created the problem of such compliance and failed to give the states consistent and workable guidance on how to solve it." See *People v. Frierson, supra,* 25 Cal.3d at 189-190 (concurring opinion of Mosk, J., joined by Newman, J.)

Therefore the majority view of the California Supreme Court was that the validity of California's death penalty is a federal question. Indeed, this Court in *Gregg v. Georgia, supra,* stated that each distinct death penalty sentencing system must be examined on an individual basis. *Gregg v. Georgia, supra,* 428 U.S. at 195.

II

THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" SPECIAL CIRCUMSTANCE, TAKEN IN THE CONTEXT OF ITS USE IN THE CALIFORNIA DEATH PENALTY STATUTORY SCHEME SATISFIES FEDERAL DUE PROCESS REQUIRMENTS

A. Proffitt v. Florida cannot be distinguished

Defendants brush aside *Proffitt v. Florida, supra,* urging this court limited review in *Proffitt* to the question whether the Florida capital-sentencing scheme, viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty (citing *Proffitt v. Florida, supra,* 428 U.S. at 254, fn. 11; *Gregg v. Georgia, supra,* 428 U.S. at 201, fn. 51). (Opposition, pp. 3-4.) In answer, we urge that the due process argument was rejected by this Court in *Proffitt.* Proffitt had asserted that the Florida aggravating and mitigating circumstances were so vague and broad that virtually " 'any capital defendant becomes a candidate for the death penalty. . . .' " *Id.,* at 255. Under challenge was the aggravating circumstance which authorized the death penalty for crimes "especially heinous, atrocious, or cruel." Noting that the Florida Supreme Court had determined the "especially heinous, atrocious, or cruel" aggravating circumstance was directed only at " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim' ", this Court advised that it could not say the aggravating circumstance provided inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. *Id.,* at 255-256. If the "especially heinous, atrocious, or cruel" aggravating circumstance provides adequate guidance to capital sentences in Florida, the same should hold true for California. *Proffitt* establishes that the language "especially heinous, atrocious, or cruel" is not unconstitutionally vague resulting in the capricious or arbitrary infliction of the death penalty.

As noted in the Petition for Writ of Certiorari (p. 20) the specific issue of whether the challenged language is vague under the due process clause, was rejected in *Spinkellink v. Wainwright*, 578 F.2d 582, 610-612 (5th Cir. 1978), *cert. den.* 440 U.S. 976, *reh. den.* 441 U.S. 937. This Court denied Spinkellink a stay of execution of his death sentence. *Spinkellink v. Wainwright, et al.*, 442 U.S. 1301 (1979).

B. The "especially heinous, atrocious, or cruel" special circumstance is not duplicative of the murder by torture special circumstance

Defendants argue that the "especially heinous, atrocious or cruel" special circumstance is duplicative of the murder by torture special circumstance, which defendants concede contains definite language. (Opposition at p. 5.) California Penal Code section 190.4, subdivision (a) provides in relevant part:

> "Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime."

Murder by torture is one means of committing murder which elevates the crime to first degree. Cal.Pen.Code § 189. Murder by torture is distinguished in California from murder less severely punished by the *means* in which it is carried out. *People v. Wiley*, 18 Cal.3d 162, 167-169 (1976). For example, in *Wiley* the victim was beaten first on the head with fists, then he was beaten on all parts of his body with a baseball bat, followed by a hammer. The California Supreme Court determined that this evidence was sufficient to have permitted the trier of fact to have concluded the defendant intended the victim to suffer. *Id.*, at 167-168.

We urge that a murder may be "especially heinous, atrocious, or cruel" without establishing murder by torture, either as a basis for reaching first degree murder by torture, or invoking a penalty phase of the trial via the murder by torture special circumstances. Compare *Spinkellink v. Wainwright, supra,* 578 F.2d 586, wherein defendant shot his sleeping victim once in the head and then in the back. Spinkellink's crime would not have amounted to murder by torture but Spinkellink was executed for a crime which was found to be especially heinous, atrocious, or cruel.

C. Special circumstances in California are sentencing standards, not elements of capital murder

Defendants contend that special circumstances in California are elements of capital murder, so that they must have the same degree of definition and certainty as elements of a crime. This interpretation is erroneous.

In *People v. Green*, 27 Cal.3d 1 (1980), the California Supreme Court analyzed the 1977 death penalty law enacted by the Legislature and, although this was replaced by the electorate with a new death penalty law which altered and increased the special circumstances for which the death penalty could be imposed,[1] the Court's discussion of "special circumstances" applies to the new law. The *Green* court recognized that the thrust of *Furman*[2] was that absolute discretion vested in the jury to determine life or death in capital cases constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because death sentences were arbitrarily im-

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[1]Section 5 of the Initiative Measure passed by the electorate in the November 7, 1978 general election.

[2]*Furman v. Georgia*, 408 U.S. 238 (1972).

posed in that: " 'there [was] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.' " *Id.*, at 48; quoting *Furman*, 408 U.S. at 313. The *Green* court next noted that this Court in *Gregg v. Georgia, et al.*, adopted as a solution to absolute jury discretion the requirement that jury discretion in capital cases " 'be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Id.*, at 48; quoting *Gregg*, 428 U.S. at 189. Further, "guidance must be provided by *objective sentencing standards* designed to compel the jury to 'focus on the particularized circumstances of the crime and the defendant.' " *Id.*, at 48; quoting *Gregg*, 428 U.S. at 199. (Emphasis added.) The *Green* court next stated that the intent in adding special circumstances to the California death penalty law was "manifestly to provide sentencing standards in capital cases *adequately specific* to satisfy the requirements of the *Federal Constitution* enunciated by *Furman* and *Gregg, et al.*" *People v. Green, supra,* 27 Cal.3d at 49. In short, the California Supreme Court has left no doubt that special circumstances are sentencing standards, not elements of crime. We remind the Court that the "especially heinous, atrocious, or cruel" death penalty sentencing standard has already been upheld as adequately specific to satisfy due process in *Spinkellink v. Wainwright, supra*, 578 F.2d 582, *cert. den.* 440 U.S. 976, *reh. den.* 441 U.S. 937, and with ultimate finality by this Court in *Spinkellink v. Wainwright, et al.*, 442 U.S. 1301 (1979).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated: October 23, 1980.

Respectfully submitted,

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